

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

NO. 77-4132

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

LAY FACULTY ASSOCIATION, LOCAL 1261
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

ST. ANN'S EPISCOPAL SCHOOL,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

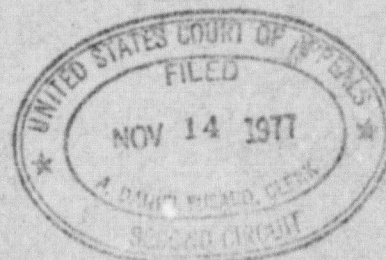
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

DOROTHY L. MOORE,

Attorney,

National Labor Relations Board.
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.



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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the board properly found that there was insufficient record evidence to find that St. Ann's Episcopal School's failure to renew the teaching contract of Robert N. Hoffman was motivated by his concerted and other activities protected by the Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon petition of Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO (herein "the Union"), to review and set aside an order of the National Labor Relations board issued on June 10, 1977, and reported at 230 NLRB No. 21,^{1/} dismissing the unfair labor practices alleged in the complaint. St. Ann's Episcopal School (herein "the School") was granted leave to intervene on August 8, 1977. This Court has jurisdiction under Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151 et seq.), the events at issue having occurred in Brooklyn, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board dismissed a complaint alleging that the School violated Sections 8(a)(1), (3) and (4) of the Act by failing to renew the teaching contract of Robert N. Hoffman. The facts on which the Board based its decision are summarized as follows:

A. Background

The School, a private nonsectarian elementary and secondary school, is engaged in providing educational services for 750 very bright students

^{1/} By stipulation of the parties, a deferred appendix will be filed. "D" herein refers to the decision and order of the Board; "JD" refers to the decision of the Administrative Law Judge; "Tr." refers to the stenographic transcript of the hearing before the Administrative Law Judge; "GCX" refers to the General Counsel's exhibits; and "RX" refers to the School's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

from first through twelfth grades (JD 2; Tr. 462-464). Stanley Bosworth has been the School's headmaster since its establishment in 1965 (JD 2; Tr. 461-462). Linda Kaufman is the assistant headmaster (Tr. 411) and Peter Cohen is chairman of the Science Department (Tr. 713). The School prides itself of the admission of its students to the "most competitive schools" in the country (JD 3; Tr. 467-468, RX 4). Bosworth's philosophy is that the students come first and he is not concerned with democracy for his teachers (JD 3; Tr. 486-487). Robert N. Hoffman taught in the School's science department for three years beginning in September 1973. His employment ended at the end of the school year in 1976 when his contract was not renewed (JD3).

B. Hoffman seeks out the Union

At the end of 1974, some of the teachers became dissatisfied because of some difficulties with the administration of the School (JD 3; Tr. 32-33). As a result, a faculty committee was formed (JD 3; Tr. 33-34). During the next few months, the committee met with Headmaster Bosworth (JD 3; Tr. 36, 37) and discussed such subjects as noisy areas in the building, rehiring and contracts, and various curriculum matters (JD 3; Tr. 37). Hoffman was an active participant in the faculty committee.

In February 1975, a science department meeting was held in the apartment of a member of the science department faculty (JD 4; Tr. 68). During the course of this meeting, department Chairman Cohen said that Bosworth characterized Hoffman as an organizer and instructed him to write something about Hoffman which could be used in the future (JD 4; Tr. 68-69,

298).^{2/} In March 1975, the faculty committee discussed the possibility of union representation (JD 3; Tr. 46-47, 48), and Hoffman was designated to investigate the matter (Tr. 49). Hoffman went to the Union's office to discuss the problems the teachers were generally having and how a union campaign would be conducted (Tr. 49-50). He arranged for a meeting between the Union representatives and the teachers (JD 3; Tr. 50-51). On April 1, 1975, a letter was sent to members of the faculty urging them to consider unionization and explaining the method or procedures for establishing a union, noting that this would be conducted under the supervision and jurisdiction of the National Labor Relations Board (GCX 3, Tr. 53). The letter was signed by the seven members of the faculty committee, including Hoffman (GCX 3). Thereafter, union authorization cards were distributed by mail, in person, and in some cases, by Hoffman himself (JD 3; Tr. 61-62). Further meetings were conducted with union representatives (JD 3; Tr. 62).

^{2/} These remarks by Cohen are not alleged as unfair labor practices in the instant case.

On February 11, 1975 and May 19, 1975, Patricia Palmieri and Hoffman, respectively, filed charges against the School. Hoffman filed Section 8(a)(1), (2) and (3) charges, but all allegations except some Section 8(a)(1) violations were dismissed (RX 9). The remaining portions were consolidated for trial with the charges by Palmieri. The parties entered into a settlement Stipulation providing for entry of a consent order by the Board and a consent judgment by any appropriate United States Court of Appeals (RX 7). The Stipulation also contained a non-admissions clause and provided that the School make Palmieri whole by payment to her of \$4500. The Board, approved the Stipulation on December 18, 1975 (RX 5), and the case was closed upon compliance with the Court judgment on April 27, 1976 (RX 8).

C. Hoffman is observed and his performance evaluated by School officials

It is the practice of the School to observe its classroom teachers. These observations are conducted by the headmaster, the assistant headmasters, heads of the particular school (lower, middle, or high school), or various department chairmen (JD 4; Tr. 429-431, 463-472, 716). In the spring of 1975, a policy of written evaluations was instituted. The evaluation was prepared by the department chairman on the basis of the teachers' professional and classroom performance (JD 4; Tr. 430, RX 1). The factors to be considered were (RX 1, p. 8):

Areas to be considered in appraisal of professional performance:

1. Academic competence
2. Ability to get along with others
3. Participation in division, department and school activities
4. Reliability in carrying out professional responsibilities
5. Reliability in getting routine work (student reports, attendance cards, grading of papers, etc.) in on time.
6. Meeting classes regularly and on time
7. Concern for professional growth and development
8. Accessibility to students.

Areas to be considered in evaluation of classroom performance.

1. Knowledge of the subject.
2. Ability to select, plan and organize material.
3. Ability to communicate subject material and enthusiasm for learning.
4. Responsiveness to students' ideas and questions.
5. Sensitivity to individual needs and differences.
6. Discipline and control of classroom.

Science depart Chairman Peter Cohen observed Hoffman 10 times prior to Hoffman's first evaluation in May 1975 (JD 4). Assistant Headmaster

Linda Kaufman and Assistant to the head of the Middle School Toni Yagoda, observed him once and twice, respectively. (JD 4; Tr. 75-76, 443, 755.) Cohen's evaluation praised Hoffman's teaching abilities in science. However, the evaluation noted Hoffman's disciplinary problems with the middle school students and stressed a need for improvement in middle school work. The evaluation was also critical of Hoffman's approach to his high school classes and suggestions were made for improvement. (GCX 6.) Despite his shortcomings, Cohen recommended that Hoffman's contract be renewed (JD 4; Tr. 779), and Assistant Headmaster Kaufman concurred in this recommendation (Tr. 474). Brigid Barry, head of the High School, recommended against rehiring Hoffman (JD 4; Tr. 508-509). Hoffman was retained because Headmaster Bosworth wanted to give him another chance because of the difficulty of working in the School (JD 5; Tr. 479).

During the first week of the new school year in September 1975, Hoffman's classes were visited by Cohen and Barry (JD 5; Tr. 78-80, 133-134, 721-722, 510, 552).^{3/} Cohen observed that Hoffman did not know his students' names and did not use enough concrete examples to illustrate certain points (Tr. 722). Cohen suggested that Hoffman learn the names of the students in his classes (JD 5; Tr. 80, 520). At the outset of the School year, the head of the high school, Barry was visited by a group of students complaining about Hoffman's physics class (JD 5; Tr. 510, 518-520, 552-554). This resulted in Barry's visiting Hoffman's class during the first week of school. After this visit, Barry sent Hoffman a

^{3/} Hoffman taught 5 classes of biology, physics and general science (JD 5; Tr. 715, 728).

note asking that he see her about something (JD 5; Tr. 521, 82). Barry then asked Cohen to investigate the students' complaints by visiting Hoffman's classes (JD 5; Tr. 523). Hoffman did not see Barry until after she had written a second note asking that he see her (JD 5; Tr. 521). Barry received another complaint from a parent about their son's waning interest in science. Barry again asked Cohen to observe Hoffman's classes. (JD 5; Tr. 23, 726-727.) Cohen visited Hoffman's classes in October, November and December (JD 5; Tr. 724-726, 81, 85-86). During these observations Cohen saw that students' desks blocked off the back of the room, students were not involved with what was going on in class, and they were passing notes and chatting (JD 5-6; Tr. 724-725).

In December 1975, Cohen prepared a written evaluation of Hoffman's performance (GCX 8). The evaluation was complimentary of Hoffman's physics class; however, it was critical of Hoffman's biology class, characterizing it as "marred by apathy and distraction" (GCX 8). The evaluation noted that Hoffman's effectiveness was "impinged upon by his rapport with students" (GCX 8). Hoffman wrote an extensive response to Cohen's evaluation (GCX 9, Tr. 95).

Cohen's observations of Hoffman's physics class continued into the second semester (Tr. 729). Barry also observed Hoffman in March 1976 (Tr. 528, 730, 99-100). Barry noted that students arrived late and that Hoffman seemed not to notice. She also observed the general lack of respect between Hoffman and his students (Tr. 529). Students also complained to Barry that Hoffman never answered their questions (Tr. 531).

In March 1976, Cohen also observed a series of Hoffman's classes. The students attentiveness ranged from interest, to passivity except for the brightest students, to seeming inability to understand the materials being presented (JD 5; Tr. 730, 731, 732). Cohen later observed only a "handful" of students present in this class (JD 5; Tr. 732, 532) and found the atmosphere "strained" and a degree of "hostility" (JD 5; Tr. 732-733). Cohen observed other actions of a similar nature (JD 5; Tr. 734, 735, 543).

C. Hoffman's contract is not renewed

On April 14, 1976, Cohen wrote another evaluation of Hoffman (JD 5; GCX 10).^{4/} The evaluation noted the dwindled size of Hoffman's physics class, the strained and uncooperative atmosphere, and absenteeism or lateness. In biology, Cohen noted the continued discipline problem and lack of respect for Hoffman. In general science, Cohen noted that one section was disorganized with a lack of order and discipline. Students sat facing in all directions and engaged in "extraneous activities" (GCX 10). Cohen and Barry recommended that Hoffman not be rehired (Tr. 737, 535). At the time Cohen gave Hoffman the April evaluation, he told him his contract would not be renewed (JD 6; Tr. 737). In recommending that Hoffman's contract not be renewed, Assistant Headmaster Kaufman relied on Cohen's evaluations, talking with the division head and her personal observations (Tr. 420, 422, 423, 443). In concurring in the decision not to renew Hoffman's contract, Bosworth relied on his

4/ Barry wrote a file memo as to her evaluation (RX 6, Tr. 534).

his conversations with children, the cumulative evaluation as to Hoffman's teaching abilities, declining attendance in his physics class, and a downward trend in the grades and test scores of Hoffman's students^{5/} (JD 6; Tr. 472, 474, 849-850). Although Hoffman's contract was not renewed, the other six teachers signing the April 1 letter urging unionization were all offered renewed contracts (JD 6; Tr. 424-425).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the School did not violate Sections 8(a)(1)(3), and (4) of the Act by failing to renew the teaching contract of Robert N. Hoffman, and ordered the complaint dismissed in its entirety (D 2).

ARGUMENT

IT WAS PROPER FOR THE BOARD TO CONCLUDE THAT THE SCHOOL'S REFUSAL TO RENEW THE TEACHING CONTRACT OF ROBERT N. HOFFMAN DID NOT VIOLATE SECTIONS 8(a)(3) AND (4) OF THE ACT

A. Introduction

The issue here, as in every Section 8(a)(3) and (4) case is "the 'true purpose' or 'real motive'" behind the adverse action taken. Local 357, Teamsters v. N.L.R.B., 365 U.S. 667, 675 (1961), quoting Radio Officer's Union v. N.L.R.B., 347 U.S. 17, 43 (1954). If the School's

^{5/} Charts were introduced at the hearing comparing the test scores of Hoffman's students with other teachers teaching the same course. (RX 10, 11, 12, 13, 14, 15, 16, 17). The charts showed a decline in the performance of Hoffman's students on college board achievement tests. The Union argues (Br. 18-19), that the charts were not a factor in Hoffman's dismissal because the charts were prepared after the decision to dismiss Hoffman was made. However, Bosworth was well aware of the tendencies which these charts demonstrated based on his review of reports for individual students (Tr. 849-850).

treatment of Hoffman was not motivated by a desire to discriminate against him because of his concerted and union activities or by his filing of charges with the Board, it is immaterial whether the actions were arbitrary, unfair, or unreasonable. For, as the courts have often held, the Act does not "give the Board any control whatsoever over an employer's policies . . . [A]n employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act."

N.L.R.B. v. Ace Comb Co., 342 F. 2d 841, 847 (C.A. 8, 1965). See also, Caddell-Burns Manufacturing Co., Inc. (Rose Davis) 222 NLRB 488, affirmed 95 LRRM 2274 (C.A. 2, 1976); Associated Press v. N.L.R.B., 301 U.S. 103, 132 (1937); N.L.R.B. v. Great Eastern Color Lithographic Corp., 309 F. 2d 352, 355 (C.A. 2, 1962), cert. denied 373 U.S. 950. And, as the Board has recognized, "[i]n every case, a violation of the Act must be proved by the General Counsel by a preponderance of the evidence." Falstaff Brewing Corp., 128 NLRB 294, 295 n. 2 (1960), enf'd as modified, 301 F. 2d 216 (C.A. 8, 1962). See also, NLRB Statements of Procedure, Series 8, (29 C.F.R.) Section 101.10(b).

Of course, where there is no direct evidence of a discriminatory motive, the Board must examine the record to determine if there is support for an inference of such motivation. Such an inference, however, "must be based upon evidence, direct or circumstantial, not upon mere suspicion." Cedar Rapids Block Co. v. N.L.R.B., 332 F., 2d 880, 884 (C.A. 8, 1964). See also, N.L.R.B. v. Finesilver Mfg. Co., 400 F. 2d 644, 649 (C.A. 5, 1968). Where the Board finds insufficient evidence

to support such an inference, "that determination must be upheld unless it has no rational basis." International Ladies' Garment Workers Union, AFL-CIO v. N.L.R.B., 463 F. 2d 907, 919 (1972) and cases there cited. And it is well settled that a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951). We show below that the record evidence, considered as a whole, does not compel an inference that the failure to renew Hoffman's teaching contract was unlawful, and hence the Board's dismissal of the complaint should be affirmed.

- B. The Board was not required to conclude that the School discriminatorily refused to renew Hoffman's contract in violation of Section 8(a)(3) and (4) of the Act.

There is no question that Hoffman was an active participant in the faculty committee, that he was further involved in seeking Union representation, and that he filed charges with the Board on May 19, 1975. Nor is there any question that the School knew of Hoffman's participation in these activities (JD 6-7). However, the record is clearly lacking in evidence that the School's 1976 action against Hoffman was rooted in the earlier, protected activity rather than the reasons assigned at the time. Thus, the only indication of "anti-union animus" arose from charges of unfair labor practices relating to the School's conduct in late 1974 (JD 7).

However, those charges were resolved by a formal settlement agreement containing a nonadmission clause and there were no subsequent unfair labor practice charges. Indeed the record is devoid of any evidence of an "intervening event" or "contemporaneous statements" which would link the prior "animus" to the 1976 action against Hoffman (JD 7). Thus, contrary to the Union's claim (Br. 16), the School's conduct of a year earlier provides too tenuous a basis for inferring unlawful motives.

Nor is there any merit in the Union's claim (Br. 16-17) that the School's written evaluation program was directed at constructing a "pre-text" for Hoffman's termination. The written evaluation procedure, instituted in the spring of 1975, was formalized because the size of the School had increased and the Headmaster was no longer able to do the individual evaluations (Tr. 431). This system was intended to measure something beyond "quantification" - namely, the teacher's ability to inspire children, their proficiency and control of the classroom (Tr. 472-473). This evaluation system, implemented by a series of observations, was equally applicable to others, as well as Hoffman. It is axiomatic that evaluations based upon one's observations sometimes carry with them a degree of subjectivity. However, a number of objective factors played a part in Hoffman's evaluations. These objective facts, which were undenied, consisted of: students reading comic books in class, eating oranges in class, and sitting in disarray around the classroom; lack of attentiveness; the manner and tone of questions; and remarks by the students and responses by Hoffman (JD 7-8; Tr. 724,

725, 731-732, 734, 735), and test scores not commensurate with other teachers in the same course. These factors, which served as the basis for Cohen's evaluations, do not stand alone; Barry, too, noted her observations regarding Hoffman's abilities (RX 6). In deciding not to renew Hoffman's teaching contract, Headmaster Bosworth did not rely solely on one evaluation, instead, he relied on the cumulative evaluations, conversations with children and finally, his own observations. In view of the School's emphasis on motivating and advancing its students into the "better" colleges, these factors provide reasonable grounds for not renewing Hoffman's contract. They clearly fall far short of establishing a false or pretextual basis for the School's action.

Nor can the Union substantiate its claim (Br. 7) that Hoffman's evaluations were the result of disparate treatment. To be sure Hoffman was observed approximately 20 times during the last evaluation period, while other teachers were not observed as much. However, the administration had received numerous complaints about Hoffman,^{6/} and Hoffman himself had complained that he had not been observed enough after receiving his first appraisal (JD 8; Tr. 291-293). It should also be noted that there were some six other teachers who were active on behalf of the faculty committee and the Union, and that none of them suffered non-renewal of their contracts or other reprisal for their protected activities (JD 8; Tr. 424-425).

^{6/} The absence of written complaints by children or their parents does not negate the existence of the complaints.

In sum, the Board properly focused its inquiry, not on the "correctness or fairness" of the School's decision, but rather on whether the General Counsel had shown by a preponderance, of the evidence that the decision was based on union or other activities protected by the Act (JD 8). In view of the absence of evidence showing contemporaneous anti-union animus, disparate treatment, timing,^{7/} pretext, or other indicia of unlawful motivation, the Board was amply warranted in concluding that Counsel for the General Counsel had not carried her burden of proof and that the complaint should be dismissed.

^{7/} The Union's assertion that the closing of the prior unfair labor practice case on April 27, 1976, two days before the failure to renew Hoffman's contract raises a suspicion of unlawful motivation (Br. 6-7) is without merit. The closing of a case is merely an administrative act following full compliance with the notice-posting and other provisions in the Board's order; it has no significance in terms anti-union timing.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Petition for Review should be denied.

DOROTHY L. MOORE,
Attorney,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

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